Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
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REPLY COMMENTS OF THE AD HOC TELECOM USERS COMMITTEE

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SUMMARY

The Notice in this docket proposes to accelerate the already-streamlined procedures for processing carrier applications to discontinue services as part of the transition to IP- and fiber-based network technologies. The Commission must ensure that any changes to its discontinuance procedures are consistent with the statutory requirement that "neither the present nor future public convenience and necessity will be adversely affected" thereby. 47 U.S.C. § 214(a).

Large enterprise users like Ad Hoc's members have built and must continue to operate, maintain, repair, improve, and evolve enormously complex telecommunications and related information technology infrastructures. These infrastructures are vital assets not only to the individual companies but to their customers and the economy at large. Migration to new network technologies can make these networks better in many ways: faster, more robust, more flexible and versatile, and more cost-effective. But during the period of migration, it is essential that existing networks, in all their complexity and interrelatedness, continue to work and that customers have sufficient time to migrate their services to new technologies without undue disruption to their businesses. The Commission must avoid regulatory changes that would jeopardize the ability of existing infrastructures to continue serving customers while new services are installed and fully vetted.

Ad Hoc urges the Commission to reject some commenters' suggestions that it eliminate Section 68.110(b) of the rules, which provides that carriers must give adequate notice of network changes to customers whose equipment would be reasonably expected to be materially affected thereby, "to allow the customer an

opportunity to maintain uninterrupted service." Without this Section, carriers would be free to change their networks in a manner that renders customers' existing termination equipment incompatible or inoperable, without giving the customers a reasonable opportunity to plan infrastructure adjustments to receive uninterrupted service. The potential for chaos is clear, and the benefits to carriers of eliminating the rule are minimal, if any.

The Commission must also reject AT&T's proposal to eliminate the existing "three-prong test" for streamlined processing, which requires that an alternative service be identified which is of at least equal quality as the old service and meets existing standards and interoperability requirements for use with standard customer peripherals. The existing test at least colorably provides assurances that the public convenience and necessity will not be adversely affected if a service is discontinued on a streamlined basis. AT&T's proposal that only a single wireline or wireless voice or VoIP service be identified, which need not meet any of the three prongs, would provide no basis for concluding that a replacement service is adequate.

Ad Hoc strongly disagrees with some carriers' proposals to shorten already aggressive 15- and 30-day comment periods, and 31- and 60-day automatic grant intervals, to 10 and 25 days (and in some cases even less). Carriers plan and execute network changes over months and years; requiring them to file applications a few weeks earlier in this cycle (or to delay implementation by a few weeks) is hardly burdensome given those time frames. But those few weeks will make all the difference to the ability of end users to discover and analyze discontinuance applications to determine whether they pose a threat, and to prepare and file comments that are effective in helping the

Commission understand the ramifications of the discontinuance. In addition, apart from the regulatory cycle, the Commission should require carriers to continue to honor longer notice periods to which they have agreed contractually with users, since these too are vital in preventing disruption.

"Grandfathering" existing customers reduces some concerns regarding more streamlined procedure but only if the scope of such grandfathering enables users to address the dynamic nature of their networks and accommodate the usual churn in locations served by the service. Ad Hoc supports commenters that would sharpen this definition, while opposing carrier proposals to loosen these criteria.

Finally, in assessing whether a service is being discontinued in a manner that would adversely affect the public convenience and necessity, notwithstanding various carrier assertions to the contrary, the Commission must continue applying a "functional" test which takes into account the real-world consequences of discontinuance for the actual users of the service. The Commission's proposal to limit the characteristics of a replacement service to the service as described in a tariff or service guide, which fail to capture the "real life" features and parameters of the service of which users take advantage (and from which the carriers profit), would be inadequate to assure that the statutory requirement is met.

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The Ad Hoc Telecom Users Committee ("Ad Hoc") hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comments ("NPRM" or "Notice")[1] in the docket captioned above.

The Notice is the latest chapter in the Commission's response to the natural migration of the nation's telecommunications infrastructure from time division multiplexing ("TDM") to Internet protocol ("IP"). It follows the Commission's 2015 and 2016 orders in its *Technology Transitions* proceeding, GN Docket No. 13-5, the latter of which is still subject to review by the Office of Management and Budget.[2] Among other things, the Notice proposes to alter some provisions of the *2016 Order*.

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[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84*,* Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (rel. Apr. 21, 2017) ("*NPRM*" or "*Notice*").

[2] *Technology Transitions, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 (2015) ("2015 Order"); *Technology Transitions, USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, *Policies and Rules*

The technological migration now underway undoubtedly promises public benefits but, absent compliance with Section 214 of the Communications Act, the migration can also cause serious disruption and substantial direct and hidden costs to end users. The Commission's mandate, as always, is to balance these concerns and assess service discontinuance applications in a manner which ensures that, as Section 214(a) of the Act requires, "neither the present nor future public convenience and necessity will be adversely affected" by such discontinuance. As discussed below, Ad Hoc believes that some of the changes proposed in the Notice would result in procedures that fall short of meeting this statutory requirement. The abbreviation of the Commission's protective procedures proposed in the Notice would jeopardize consumers' ability to alert the Commission to harms that may arise from ill-considered or premature service discontinuance without materially increasing the benefits accruing from technological migration. The Commission must avoid changes that would cross the line between useful expedition and damaging haste.

INTRODUCTION

Ad Hoc represents a broad cross-section of enterprise users that utilize the entire gamut of telecommunications products and services available to business users in the market today. Ad Hoc members spend some $2-3 billion annually in this sphere. Member companies come from a broad variety of industries, including the automotive, banking, construction, financial services, insurance, information technology, logistics, paper products, package delivery, transportation, and manufacturing sectors. As such,

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Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283 (2016) ("2016 Order").

Ad Hoc members must stay abreast of, and react quickly to, technological and marketplace developments in communications and information technology products and services. Of these, perhaps the most critical is the ongoing transition of the telecommunications industry to IP-based services. Ad Hoc members are not "following" these developments; they are leaders in implementing the ways in which this technological transformation can bring better, more robust services to market and provide growing efficiencies and cost savings to consumers – and the ways in which they can use these improvements to better serve their own customers.

Throughout the Commission's proceedings addressing these issues, Ad Hoc has urged the Commission to exercise appropriate regulatory oversight to accomplish two key objectives. First, the Commission must require ILECs to ensure that their deployment of new technologies is *transparent* to customers so that it does not disrupt their use of services or require them to invest in new equipment merely to "stay even." In particular, the Commission should require carriers to carry out their transition plans in a way that is non-disruptive to users and passes through to customers the cost savings and increased efficiencies that carriers claim will result from their technology overhauls. Second, the Commission must recognize those areas in which competition remains too weak to force carriers to carry out their transition plans in a manner that does not impose undue costs or disruptions on customers and does not enable carriers to extract monopoly rents from end users.

Ad Hoc agrees that deregulation is critical where competition is sufficient to protect consumer interests. As high-volume purchasers of telecommunications services, Ad Hoc members have also historically been among the first beneficiaries of

the FCC's deregulatory efforts in competitive markets. But just as they are well-positioned to benefit from competitive markets, Ad Hoc members must also operate in areas where competition is too weak to supplant regulation in protecting consumers.

Technological transformation, while important, does not guarantee that the market will be competitive. As Ad Hoc noted previously:

> [T]he evolution of public and private networks from legacy services to packet-mode services does not change the underlying market characteristics or market power conditions for last mile transmission facilities. The "transition" … is a change in the transmission protocol used to send information over special access transmission facilities; it is not a change in the facilities and marketplace forces that confer market power on the ILECs. Whether traffic is transmitted over copper or fiber, using legacy TDM transmission protocols or over those same facilities using packet-mode transmission protocols, the relevant metric for the Commission's analysis is competition for the provision of the facility. Change in the transmission protocol of traffic transmitted over a physical facility – or even a change in the transmission protocol demanded by customers – does not necessarily introduce additional "competition" into the market.[3]

Accordingly, the Commission must ensure that the ILECs do not use this transition to exploit their market dominance where it still exists or impede the development of competition in markets where such competition is still emerging.

Ad Hoc members are distinct from smaller consumers in that they design, build, and maintain vast, complex telecommunications and information technology infrastructures, comprising a multitude of interdependent piece-parts of many different types of services and terminal equipment procured from many different manufactures and providers. It is no exaggeration to say that the construction and maintenance of

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[3] Comments of the Ad Hoc Telecommunications Users Committee, *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012), filed Feb. 11, 2013 at 10.

these systems is mission-critical, not only for the companies directly involved but also for the American economy as a whole. Without them, the creation of goods and services, their ordering by and delivery to American consumers, the processing of payments for them, and the transmission of vital information regarding them would be impossible.

The cost of planning, designing, assembling, trouble-shooting, repairing, and evolving these systems is enormous. Most importantly for the current inquiry, this process takes time. As the underlying technologies used by telecommunications carriers change – and existing services and technologies are discontinued – managers of enterprise users' infrastructures must plan and execute corresponding changes in their own operations. This is not simply a matter of swapping out one piece of a new technology for a corresponding piece of the old; the change to one component of a network is likely to require alterations to the components directly connected to it, analysis to determine whether broader design changes are also called for, and debugging to assure that the pieces will continue to work together. Without adequate notice and protections against harmfully timed or executed discontinuance, this transition process would be substantially disrupted, costing American business and consumers many millions of dollars.

Ad Hoc welcomes new technology – after all, its members and their customers stand to benefit from these technologies as much as anyone and more than most. But if network changes are deployed in a way that hinders rather than fosters the complex deployment processes described above, Ad Hoc's members and their customers will be harmed, not helped. As set forth below, a number of the changes proposed in the

Notice and supported by the carriers in their comments – not to mention some carriers' attempts to further water down regulatory safeguards – do not adequately protect against such an outcome. These deficiencies must be corrected as part of any action the Commission may take in this proceeding.

DISCUSSION

I. THE COMMISSION MUST ENSURE USER TRANSPARENCY BY MAINTAINING SECTION 68.110(b) OF THE RULES

In paragraph 70 of the NPRM, the Commission asks whether it should eliminate Section 68.110(b) of the Rules. This Section provides that when a carrier plans to "make changes in its communications facilities, equipment, operations or procedures," then:

> I]f…changes …can be reasonably expected to render any customer's terminal equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.

In their comments, some carriers have seized upon this suggestion, decrying the rule's notice requirement as yet more unnecessary paperwork and claiming that they cannot be expected to comply with it because they are ignorant of the types of terminal equipment customers are using. AT&T, for example, argues that carriers cannot be expected to comply with this rule because they "would not have knowledge of what equipment is being used by the customer to attach to the network and access the

service."[4] Frontier claims that "carriers have little window into what network equipment customers are using."[5]

In assessing these carriers' claims, a bit of historical perspective is useful. Section 68.110(b) was adopted in 2001 as part of a major streamlining of the Commission's rules regarding technical criteria for customer terminal equipment to be connected with the network. As summarized by the Commission at the time, this revision allowed "the Commission to replace approximately 130 pages of technical criteria currently in the rules with only a few pages of simple principles that terminal equipment shall not cause any of the prescribed harms to the public switched telephone network…".[6] Because the Commission was stepping away from the direct oversight of these criteria, it needed to assure that customers were adequately apprised of network changes affecting their use of terminal equipment so that they did not find themselves stranded. Accordingly, the protection set forth in Section 68.110(b) was adopted.

The Notice now suggests that this rule might be dispensed with, querying whether its benefits outweigh its costs, and specifically asks, "how is it that a carrier is able to know whether 'any' terminal equipment would be affected?"[7] and, as noted above, several carriers have chimed in with their support.

It is hard to imagine circumstances in which this rule does *not* materially benefit users of telecommunications services. By its own terms, the rule is designed to "allow

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4 Comments of AT&T Services, Inc., filed herein June 15, 2017 ("AT&T Comments"), at 36.

5 Comments of Frontier Communications Corporation, filed herein June 15, 2017 ("Frontier Comments"), at 25.

6 *2000 Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations*, CC Docket No. 99-216, Report and Order, 15 FCC Rcd 24944 at para. 4 (Dec. 21, 2000).

7 *Notice* at para. 70.

the customer an opportunity to maintain uninterrupted service,"[8] which is a bedrock objective of the Act. Given the ripple effects on enterprise customers' IT infrastructures described in the Introduction above, any service interruption arising from inadequate notice would have a cost that is a very large multiple of the mere loss of the piece-part involved. Enterprise customers would be required to redesign their networks on the fly and after the fact, and major disruptions and interruptions to their ability to serve their own customers would be inevitable. The avoidance of these costs and disruptions is a clear and major benefit arising from the rule as it exists today.[9]

Nor can there be any serious dispute that the costs to the carrier of an adequate notice period are modest. The rule itself does not dictate a particular procedure or time of the notice; it merely requires that the notice be "adequate" to allow interrupted service. Carriers should be in favor of, not opposed to, this requirement. Given the amount of money they spend already on communicating with their customers regarding the bells and whistles of their new services, it is clearly not burdensome to require that they also apprise customers in advance of changes to customer equipment that will be necessary.

Finally, notwithstanding their protestations, the suggestion that carriers would not know whether terminal equipment would be affected by network changes is without merit. Carriers are made aware of the types of equipment that can be interconnected to

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[8] 47 C.F.R. § 68.110(b).

[9] AT&T argues that this rule is not necessary because CPE manufacturers will have market incentives to design new equipment that meets new interface standards. AT&T Comments at 36-37. But this is irrelevant to the purpose of Section 68.110(b), which is to provide *customers* with adequate notice of changes so that they can prepare their networks to avoid interruption. If CPE manufacturers did not offer equipment compatible with the new standard, of course, no notice period, however lengthy, could be sufficient. But even given the availability of compatible equipment, customers still need time to figure out what is needed and then plan, fund, and deploy it.

their networks through the Part 68 process itself as well as by countless industry fora, standard-setting groups, conferences, and publications. Indeed, many service providers partner with equipment providers to deploy and manage this equipment for their customers. Among many examples, AT&T, for example, partners with Nortel, Avaya, Cisco, Genesys, and many others to provide call center solutions to small businesses.[10] Similarly, it markets a broad suite of network integration services to enterprise customers in which, it boasts, "AT&T [acts as] a general contractor that supplements our leading network services portfolio while integrating technologies and services from our partners, platform providers and carriers".[11] Any failure of awareness on AT&T's or any other carrier's part in this area would be business malpractice, not grounds for excusing it from a perfectly reasonable requirement.[12]

II. THE COMMISSION SHOULD REJECT AT&T'S PROPOSAL TO ELIMINATE THE THREE-PRONG "ADEQUATE REPLACEMENT SERVICE" TEST

In its *2016 Order*, the Commission adopted criteria for the automatic grant of discontinuance applications "involving a technology transition from TDM to IP or wireline to wireless in which the applicant intends to discontinue completely customers' access to the legacy voice service."[13] Automatic grant of such applications would occur in a

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10 "Call Center Solutions Portfolio Summary," https://www.att.com/gen/general?pid=10213, retrieved July 14, 2017.

11 "How Network Integration is empowering global enterprises," https://networkingexchangeblog.att.com/business/network-integration-empowering-global-enterprises/, retrieved July 14, 2017.

12 The rule does not require perfect knowledge by the carrier but applies only if network changes "can be reasonably expected" to result in terminal equipment incompatibility. If there were some arcane use of terminal equipment by, say, a tech hobbyist that is unknown to the community or industry at large that the carrier could not be reasonably expected to know would be affected by the network change, this rule would not apply to such use.

13 *2016 Order* at para. 73.

specified time frame provided that the application demonstrates that an "adequate replacement service" is available for the service being discontinued. A service would be deemed an "adequate replacement service" if it satisfied all three of the following criteria: (1) satisfaction of specified objective, measurable benchmarks designed to assure that the quality of the replacement service is as good as, or better than, the service being discontinued; (2) compliance with existing Commission rules or industry standards; and (3) compatibility and interoperability with an enumerated (and very short) list of "key" applications and functionalities.[14]

The failure of a replacement service to meet these standards would merely disqualify the discontinuance application from automatic approval; it would not prevent the carrier from making the necessary Section 214 showing in some other way under non-streamlined review.[15] This three-prong test represented a distillation and streamlining of a previous five-factor test, and made the criteria more concrete and objective than they had previously been.

AT&T now proposes to jettison this three-prong test. Instead, an application would qualify for automatic grant as long as any fixed or mobile voice or VoIP service would still be available to affected users.[16] There would be no requirement that such

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[14] *2016 Order* at paras. 86 *et seq*. The initial list of key applications includes only fax machines, home security alarms, medical monitoring devices, analog-only caption telephone sets, and point-of-sale terminals. *Id.* at para. 159.

[15] *Notice* at para. 64.

[16] AT&T Comments at 42-43. This proposal is even less meritorious than a proposal contained in a publicly-circulated draft version of the Notice, but wisely abandoned by the Commission prior to release of the actual notice. See draft Notice attached to "FCC Fact Sheet: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, FCC-CIRC1704-02, https://apps.fcc.gov/edocs_public/attachmatch/DOC-344161A1.pdf, at paras. 83-85. That draft test would have replaced the three-prong test with a showing that (1) the carrier discontinuing the voice service in question "provides interconnected VoIP service throughout the affected service area" and (2) "at least one other alternative voice service is also available in the affected service area." That proposal would have required two alternatives rather than one, and the VoIP alternative would have had to be provided by the

alternative voice service permit continued use of the short list of key applications and functionalities.

Thus, under AT&T's new proposal, a carrier's discontinuance application would be eligible for automatic grant even if (a) the alternative service still being offered was of substandard quality and (b) customers would be unable to use critical applications, embedded equipment, and functionalities that meet industry and FCC interconnection standards and were compatible with the discontinued service.[17]

The last issue is particularly significant for business customers. Absent some compatibility or interoperability requirement for the replacement service, a service discontinuance could produce staggering, albeit unintended, economic disruption if large-scale networks of business-critical devices become inoperable. If, for example, point-of-sale terminals for inventory control or credit card validation are rendered inoperable, the collateral consequences would include clogging the voice network with confirmation calls, increasing the risk of fraud and abuse, and generally increasing transaction costs for consumers and businesses alike.

The three-prong test in the existing rules may not be perfect but it is reasonably well-designed to serve the bedrock statutory requirement that "neither the present nor

carrier discontinuing legacy voice. The defect in that proposal, of course, was that it provided no assurance that affected customers would not suffer a precipitous drop in service quality, including the inability to keep using critical functionalities. AT&T's proposal is worse still. Since it would not even require two alternatives.

[17] CenturyLink somewhat in passing, suggests that a replacement service should be deemed adequate if a "substantial portion" of the public has adopted it. Comments of CenturyLink, filed herein June 15, 2017 ("CenturyLink Comments"), at 43. Apart from CenturyLink's refusal to define – or even give criteria for – such "substantial portion" (is 80% enough? 50%? 25%?), this proposed test would ignore the interests of all the customers who have not adopted the new service, perhaps because it is inferior or unsuitable for their needs. Section 214(a) requires that the interests of all the public be taken into account, not just the interests of an undefined "substantial portion."

future public convenience and necessity will be adversely affected" by a proposed service discontinuance. AT&T's proposal cannot serve this statutory objective because it would not protect customers from incompatible replacement services or services with inferior quality and interconnection/interoperability functionalities.

III. CUSTOMERS MUST HAVE A MEANINGFUL OPPORTUNITY TO CHALLENGE A PROPOSED DISCONTINUANCE AND CONTRACTUAL NOTICE PERIODS MUST BE HONORED

Under the *2016 Order,* once an application qualifies for streamlining, it would be subject to a comment period of 15 or 30 days, depending whether the applicant is a non-dominant or dominant carrier, and corresponding automatic approval periods of 31 and 60 days.[18] The Commission now proposes certain specifically tailored further streamlining in particular narrow contexts.[19] But some carriers have urged in their comments that comment and automatic grant periods be shortened drastically in a number of contexts beyond those addressed by the Commission,[20] and, in some cases, eliminated entirely.[21] These opportunistic contractions of provisions that protect end users must be rejected.

For business customers, the existing comment and approval periods are already quite short given the potential ramifications of many service discontinuances. Carrier claims that those brief periods are unduly burdensome strain credulity. Carriers plan their network changes and service discontinuances much, much longer than ten, or even sixty, days in advance. Indeed, for many services, the carriers themselves have

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18 *2016 Order* at para. 61.

19 *See Notice* at paras. 95 *et seq.*

20 AT&T Comments at 41-47; CenturyLink Comments at 34-45.

21 AT&T Comments at 47-51; CenturyLink Comments at 39-40.

acknowledged that a much longer notice period to customers is appropriate. Thus, for example, Section GP-5 of AT&T's Business Service Guide provides that, for a number of services and unless law or regulation dictates otherwise, customers will receive twelve months' notice of discontinuance of a service, or 120 days' notice of discontinuance of a particular service component.[22] Similarly, Verizon's Online Master Terms, at Section 14, provide for six months' notice before decommissioning a service.[23] Inasmuch as these periods are offered as defaults by carriers even before negotiation, they must be taken as "sleeves off the vest" positions; carriers clearly see no harm to themselves in providing such longer notice.

Moreover, enterprise customers and carriers frequently negotiate specific contractual notice periods in their contracts, due in part to the fact that the carriers' own service guides are subject to change. Where carriers have voluntarily agreed via contract to longer notice periods, the Commission's rules should not disrupt the balance struck by the contracting parties.[24] Accordingly, the Commission must make clear in any order revising the existing rules that the notice periods in contracts and service guides are binding on the carriers in any event.[25]

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[22] AT&T Business Service Guide, General Provisions and Glossary, GP-5 (Service Availability), http://serviceguidenew.att.com/servlet/servlet.FileDownload?file=00P1A000010ZBYlUAO, retrieved July 14, 2017.

[23] Verizon Online Master Terms – United States Services, Section 14 (Decommissions), http://www.verizonenterprise.com/external/service_guide/reg/g_online_master_terms.htm, retrieved July 14, 2017.

[24] AT&T not only acknowledges these contractual protections, it expressly relies on their enforceability. In making assurances that government customers would not be harmed by its proposals, AT&T expressly notes that these users can protect themselves from inadequate notice by negotiating contractual provisions for longer notice periods. AT&T Comments at 52 and note 128. Such provisions, while not sufficient to protect the public interest in themselves, are a critical protection for not only government users but enterprise users as well.

[25] AT&T notes that "customers can renegotiate such terms to the extent they require additional time." AT&T Comments at 52, note 128. Of course, such renegotiated terms require the carrier to agree, so this comment is disingenuous unless it is interpreted to reflect AT&T's commitment to agree to

These notice periods are separate from the comment periods that are the subject of the Notice, but they demonstrate why the Commission should retain the longer comment periods currently in place. First, the notice periods clearly show that the longer existing comment periods do not harm the carriers or delay their ability to bring new services to market. Supposing that a fifty-day delay in the deployment of a change or the discontinuance of a service (the difference between the ten- and sixty-day comment periods for dominant carriers) would otherwise materially disadvantage the carrier, the carrier can avoid this by simply filing its discontinuance application earlier in its product development cycle since it knows of its discontinuance plans many months in advance.

At the same time, the longer comment period both benefits users and serves the public interest in meeting the statutory requirement that service discontinuances not be adverse to the public convenience and necessity, by enabling users in a meaningful way to detect that an application has been filed, analyze its effects, and, if necessary, draft and submit substantive comments. A ten-day notice period – with effective forfeiture of rights after that – is simply too short to permit this process to take place. Unlike carriers, it would be costly and difficult for even large users to monitor public notices (or the form-letter email notices provided by carriers pursuant to Section 63.51 of the Rules) so assiduously that they could even realize within ten days that an application affecting them has been filed. If they do see that such an application has been filed, they must then determine whether the discontinuance proposed in the

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reasonable requests by customers for extended contractual notice periods. Ad Hoc suggests that the Commission take AT&T up on its proposal by requiring carriers to agree to extended notice periods of up to one year upon customer request and to negotiate in good faith customer requests for periods longer than one year.

particular application is likely to be a problem and this often requires detailed analysis (which may involve multiple layers of internal review, engineering studies, and possibly follow-up questions to the carrier). By the time this can be completed, the ten days will have come and gone and, even if comments can be prepared and submitted within that time, such hastily prepared comments are much less likely to assist the Commission than would comments prepared with adequate time. Indeed, the longer comment period will likely reduce the number of comments filed since customers will be under less time pressure to "assume the worst" and can make a more sober assessment of the effects of the filing.

In short, any further shortening of the application processing cycle would provide negligible benefits to carriers while imposing huge risks and costs on customers. The Commission should reject such proposals.

IV. FURTHER STREAMLINING OF "GRANDFATHERED" SERVICES REQUIRES GREATER CLARITY AND SCOPE

In paragraphs 70-81 of the Notice, the Commission proposes a speedy auto-grant process for applications to discontinue a to-be-defined category of "low-speed legacy services" where existing customers are "grandfathered", i.e., service to these customers would be maintained while the carrier would be allowed to stop accepting orders from new customers. Once grandfathering had been in effect for 180 days, the carrier could use streamlined procedures to discontinue service to the grandfathered

customers. Here, too, carriers have been quick to seize on the opening and propose even more radical changes along these lines.[26]

As formulated in the Notice, this proposal poses less of a concern so long as the definition of what it means to "grandfather" a service is of sufficient scope and clarity, and so long as the more draconian changes proposed by some carriers are not adopted.

The Commission must first clarify, as Windstream points out, that grandfathering applies to *customers* and therefore permits "moves, additions, and changes to the grandfathered service"[27] by pre-existing customers. This clarification merely recognizes and accommodates the normal churn in locations and service reconfigurations that are typical for a single customer's network. "Grandfathering" is a mythical solution if it means that an existing service can be frozen in time. "Grandfathering" cannot mean that an existing service is limited to the specific customer locations in place at the time discontinuance takes effect, for example. As discussed above, enterprise customer networks tend to be geographically extensive and subject to dynamic changes and redesign "at the edges" even when the underlying technology remains static. Thus, a customer that is using a particular technology will often be hamstrung if told with only ten days to comment that it cannot continue in the near-term to use that service to serve all of its locations, even those which have been planned for months but not yet rolled out.

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[26] CenturyLink Comments at 44-45 (Commission should extend its proposal to *all* – not just low-speed services); AT&T Comments at 46-47 (carriers should be permitted to use the second-stage streamlined procedures even without prior grandfathering where customers have received 180 days notice).

[27] Comments of Windstream Services, LLC, filed herein June 15, 2017 ("Windstream Comments"), at 15.

"Low-speed legacy services," as unglamorous as they sound, are no exception to this. Enterprises with nationwide networks must often use such technologies because they are the most cost-effective alternative, e.g., in remote or low-volume locations. Consider for example, a point-of-sale terminal at a gas station in Death Valley. It would be irrational to use DS1 speeds for the likely volume of transmissions needed, even in the unlikely event that such service were available.

Second, grandfathering should extend to customers who have pending orders, or who have made bona fide inquiries about a service within the 120-day period prior to the filing of the application. These customers too have made plans and substantial investments on the basis that existing services will continue to be available for a reasonable period of time.

Windstream also points out that grandfathering would be little help to customers with long-term planning and design needs if, 180 days later, carriers are allowed to prematurely end their freely-agreed upon contractual commitment to provide service for a specified term.[28] Thus, the Commission's proposal to streamline the discontinuance of services to grandfathered customers after the lapse of an additional 180 days[29] should be rejected to the extent it would permit carriers to prematurely terminate contractual commitments.

Finally, the Commission should resist any urge to squeeze the last few drops from the regulatory lemon by shortening this period further, or by extending it to higher

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[28] Windstream Comments at 16.

[29] *Notice* at para. 85.

speed services. The infinitesimal benefit that might accrue to carriers from either of these is far outweighed by the potential for irreversible harm to customers.

V. THE COMMISSION SHOULD RETAIN THE "FUNCTIONAL TEST" FOR WHAT CONSTITUTES DISCONTINUANCE

In paragraphs 115-122 of the Notice, the Commission seeks comment on whether it should "disavow" its 2014 Declaratory Ruling, in which the Commission clarified that "the analysis under section 214 of whether a change constitutes a discontinuance, reduction, or impairment of service is a *functional* test" in which the assessment is made under the totality of the circumstances, based on the actual use of the service by wholesale and retail customers "as inputs for a wide range of productive activities."[30] In place of this standard, the Commission would look solely to the terms of the tariff or customer service agreement in defining service for purposes of determining whether a change constitutes discontinuance for Section 214 purposes.[31]

True to form, carriers have embraced this proposal with enthusiasm. CenturyLink and Frontier do so summarily, citing no evidence in support of their conclusion that only the tariff or service guide is relevant, but merely incorporating by reference the brief of USTelecom in a court appeal of the *2016 Order*.[32] Those arguments are wrong for the reasons set forth in other parties' briefs in that appeal, in comments filed by Ad Hoc in earlier stages of this proceeding, and in the *2016 Order*

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30 *Technology Transitions et al.*, GN Docket No. 13-5 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968 (2014) ("*Declaratory Ruling*") at paras. 114, 116.

31 *Notice* at para. 123.

32 CenturyLink Comments at 45-46; Frontier Comments at 27. Frontier does pad its presentation slightly by complaining that the functional equivalence test takes too long to adjudicate and requires too much paperwork, but this merely begs the question, since the Act requires that carriers take the time and file the papers needed to assure that the public interest is adversely affected.

itself. NTCA – The Rural Broadband Association similarly concludes that tariff/guide language should govern[33] — even while acknowledging a few pages earlier in its filing that "customers care that the *capabilities* they have purchased be available" (emphasis added) and that the relevant inquiry is into the "impact on the customer experience."[34]

AT&T's argument is lengthier, though no more meritorious. For example, it argues that the "service" for purposes of Section 214(a) is the "service *provided,"* not the third party add-ons that can be used with it.[35] But this actually militates *against* AT&T's conclusion, for services are "provided*"* in the world, not on paper. True, the third-party applications are not themselves part of the service, but if the service is replaced in such a way that thousands of users are no longer able to use the service in the manner upon which they have relied, and on the basis of which they have invested millions of dollars CPE and business processes, then at the very least the service is "impaired" if not "discontinued" – and either result requires a Section 214(a) application.

AT&T also cites the Commission's *Carterfone* decision in support of its conclusion, but that case has nothing to do with Section 214.[36] At most, it supports the common-sense notion that the network will not remain the same forever, but it says nothing about when changes to the network require Section 214(a) applications. AT&T then cites a 1963 Commission decision which held that a local exchange provider which only provided service at specified times of day and wanted to shift those hours was not

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33 Comments of NTCA – The Rural Broadband Association, filed herein June 15, 2017 ("NTCA Comments"), at 23.

34 NTCA Comments at 21.

35 AT&T Comments at 61.

36 AT&T Comments at 62.

required to file a Section 214(a) application *provided that it did not reduce the number of hours*.[37] Though the quaint days of limited hours of local exchange service are long gone, the mere time shift of a non-reduced number of hours of service is a far cry from the entire discontinuance of a service in a manner that leaves thousands of users completely unable to use the service in their customary fashion at any time of day. The latter is certainly the type of situation that requires the Commission to determine whether the public interest is adversely affected as Section 214(a) requires.

In the Declaratory Ruling, as reaffirmed in the *2015 Order*, the Commission observed that, while the tariffed description of a service provides some evidence of the nature of the service, it cannot be dispositive; tariffs are schedules setting forth rates and practices, not an absolute definition of what the service is or an exhaustive inventory of the characteristics and functions it makes available to the end user. The Commission pointed out that, when Verizon sought to repair wireline service on Fire Island after Superstorm Sandy by replacing it with certain wireless services, consumers complained that the proposed replacement was incompatible with important and long-standing third party services and devices that used the pre-existing wireline network, including such routine devices as "fax machines, DVR services, credit card machines, some medical alert devices, and some (but not all) other monitoring systems like alarm systems."[38]

Verizon's tariff for service to Fire Island had not mentioned the features and functions that made its service interoperable with these devices. As a result, if the

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[37] AT&T Comments at 62-63.

[38] *Declaratory Ruling* at para 116.

proposed tariff-only test had applied, the impact on those services and devices of Verizon's proposed switch to wireless would not have been addressed. But this would have led to absurd results: the Commission would have been forced to judge whether Verizon's proposed discontinuance could adversely affect the "present or future public convenience and necessity," as the Section 214(a) inquiry requires, with no information regarding the impact of the discontinuance on the public. Hence the inquiry rightly incorporated evidence of such impact.[39]

Protecting consumers is the core purpose of the statutory requirement that approval be obtained in order to discontinue services. For that purpose, the real-world impact on consumers is the central issue, not changes in the limited and high level service descriptions in a typical tariff or service agreement.[40] Moreover, carriers themselves benefit immensely when customers look beyond the four corners of the tariff in determining how the service can be used and making corresponding investments. For every use customers find for a service, demand for that service increases. When customers invest in equipment, training, personnel, and similar resources to make use of a service, the carrier benefits even more because those investments incent the customer to remain with the service and carrier. Carriers are not only fully aware of this, they actively sell into the markets that come into existence thanks to creative use of

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[39] *Declaratory Ruling* at paras. 114-117. Even though the problems in the Fire Island case arose from the proposed change in the underlying infrastructure from wireline to wireless, the functional test is in fact technologically neutral. Had the wireless platform been capable of delivering the same functionalities, the fact that it used a different technology would have been irrelevant.

[40] Commenters representing consumers decry the notion that words trump reality and urge the Commission to retain the functional test. Comments of AARP, filed herein June 15, 2017 ("AARP Comments"), at 23-26; Comments of Public Knowledge, filed herein June 15, 2017 ("Public Knowledge Comments"), at 8-12; Comments of Communications Workers of America, filed herein June 15, 2017 ("CWA Comments"), at 28-37.

their services by their customers, and they pursue business opportunities for just such linked uses when it suits them. For example, AT&T entered the home security market in 2013 with its Digital Life offering.[41] It would be disingenuous for carriers to now claim that they are myopically aware of only what is explicitly spelled out in their tariff or service guide and that applications of the service that are not specifically described therein are irrelevant to an assessment of the impact discontinuance would have.

If the carriers' position that only the tariff or service guide description defines the scope of a "service" for Section 214(a) were correct, then a Section 214(a) application would be required any time a carrier changes its tariff or service guide description of a service in a way that "impairs" the service *as described* even if the underlying service has not changed. But this would be an absurd result. The changing of words on a website is separate and apart from whether the service itself has changed.

The Commission suggests that principles of contract law are relevant here,[42] but they are nowhere to be found in Section 214, which provides only that the Commission must determine whether the public convenience and necessity will be adversely affected by a discontinuance, not whether a discontinuance is permitted because of the vague way in which the tariff is drafted. To the extent that principles of contract law *are* relevant to determining whether the loss of real life functionalities constitutes a service discontinuance regardless of whether those functionalities are detailed explicitly in a tariff, those principles would support a discontinuance analysis that takes such functionalities into account. The courts often look to evidence of custom and practice in

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41 "AT&T rolls out home security and monitoring service," c|net, April 25, 2013. https://www.cnet.com/news/at-t-rolls-out-home-security-and-monitoring-service/

42 *Notice* at para 117.

an industry in interpreting contract terms, especially specialized terms such as those found in tariff and service guide service descriptions.[43]

CONCLUSION

The Commission must proceed cautiously when it addresses service discontinuance rules because discontinuance raises some of the most profoundly disruptive and costly issues faced by end users of communications services. For all of the reasons discussed above, the Commission should protect the public convenience and necessity by rejecting the proposed changes and carrier proposals identified in these reply comments.

[43] *See*, as one of many examples, *Last Time Beverage Corp. v. F & V Distrib. Co., LLC,* 98 App. Div. 3d 947, 951 N.Y. Supp. 2d 77 (N.Y. App. Div. 2012) ("Evidence of custom and practice in an industry is admissible to define an unexplained term" (*citing Hoag v. Chancellor, Inc.*, 246 App. Div. 2d 224, 677 N.Y. Supp. 2d 531 (N.Y. App. Div. 1998); *Boody v. Giambra*, 192 Misc. 2d 128, 744 N.Y.Supp.2d 803 (N.Y.S. Ct. 2002)), especially where "the other party was actually aware of the trade usage, or that the usage was so notorious in the industry that a person of ordinary prudence in the exercise of reasonable care would be aware of it" (*citing Matter of Reuters Ltd. v. Dow Jones Telerate*, 231 App. Div. 2d 337, 662 N.Y. Supp. 2d 450 (N.Y. App. Div. 1997).

Respectfully submitted,

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Certificate of Service

I, Michaeleen Terrana, hereby certify that a true and correct copy of the preceding Comments of Ad Hoc Telecom Users Committee was filed this 17th day of July, 2017, via the FCC's ECFS system.

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